FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

July 24, 2002

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	
	:	Docket No. KENT 2002-110
v.	:	A.C. No. 15-16011-03527
HIGHLANDS MINING & PROCESSING COMPANY, INC.	:	

BEFORE: Verheggen, Chairman; Jordan and Beatty, Commissioners

ORDER

BY: Verheggen, Chairman; Beatty, Commissioner

This matter arises under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1994) ("Mine Act"). Pursuant to a timely request for hearing filed by Highlands Mining & Processing Company, Inc. ("Highlands"), on February 11, 2002, the Secretary of Labor filed a petition for assessment of civil penalty against Highlands for alleged violations of the Mine Act. On April 10, 2002, Chief Administrative Law Judge David F. Barbour issued an order to Highlands directing the company to file an answer within 30 days or show good cause for failing to do so. On June 3, 2002, noting that Highlands failed to comply with his April 10 order, Judge Barbour issued an Order of Default, entering judgment in favor of the Secretary and ordering Highlands to pay civil penalties in the sum of $1,871.

On July 8, 2002, the Commission received a request from Highlands to reopen the penalty assessment. In its request, Highlands, apparently proceeding pro se, requests relief from Judge Barbour's order, but offers no explanation for its failure to answer the Secretary's petition. Mot. Instead, Highlands asserts that its "financial condition does not permit [it] to pay the amount of the penalty at this time." *Id*.

The judge's jurisdiction over this case terminated when he issued his order of default on June 3, 2002. 29 C.F.R. § 2700.69(b). Relief from a judge's decision may be sought by filing a petition for discretionary review within 30 days of its issuance. 30 U.S.C. § 823(d)(2)(A)(I); 29 C.F.R. § 2700.70(a). If the Commission does not direct review within 40 days of a decision's

issuance, it becomes a final decision of the Commission. 30 U.S.C. § 823(d)(1). The Commission has not directed review of the judge's order here, which became a final decision of the Commission on July 15, 2002.

Relief from a final Commission judgment or order is available to a party under Rule 60(b)(1) of the Federal Rules of Civil Procedure in circumstances such as mistake, inadvertence, or excusable neglect. *F. W. Contractors, Inc.*, 17 FMSHRC 247, 248 (Mar. 1995); *see* 29 C.F.R. § 2700.1(b) (Federal Rules of Civil Procedure apply "so far as practicable" in the absence of applicable Commission rules). The Commission has also observed that default is a harsh remedy and that, if the defaulting party can make a showing of adequate or good cause for the failure to timely respond, the case may be reopened and appropriate proceedings on the merits permitted. *See Coal Prep. Servs., Inc.*, 17 FMSHRC 1529, 1530 (Sept. 1995).

Here, Highlands has provided no explanation for its failure to answer the Secretary's petition for assessment of penalty. On the basis of the present record, we are thus unable to evaluate the merits of Highlands' position. In the interest of justice, we remand the matter for assignment to the Chief Administrative Law Judge to determine whether Highlands has met the criteria for relief under Rule 60(b). *See Aurora Materials, Ltd.*, 24 FMSHRC ___, slip op. at 1-2, No. CENT 2002-223-M (July 10, 2002) (remanding to judge where operator offered no explanation for failure to timely file request for hearing); *Cantera Bravo Inc.*, 23 FMSHRC 809, 809-11 (Aug. 2001) (same); *Bailey Sand & Gravel Co.*, 20 FMSHRC 946, 946-47 (Sept. 1998) (same). If the judge determines that such relief is appropriate, this case shall proceed pursuant to the Mine Act and the Commission's Procedural Rules, 29 C.F.R. Part 2700.

Theodore F. Verheggen, Chairman

Robert H. Beatty, Jr., Commissioner

Chairman Jordan, dissenting:

I would deny the operator's request for relief from the Commission's final order. Although under Fed. R. Civ. P. 60(b)(1) we may grant relief from a final order upon a sufficient showing of mistake, inadvertence, or excusable neglect, *F.W. Contractors, Inc.*, 17 FMSHRC 247, 248 (Mar. 1995), Highlands has offered no explanation for its failure to timely file an answer to the Secretary's petition for assessment of penalty or to the judge's show cause order. This case is thus almost identical to *Cusic Trucking, Inc.,* 21 FMSHRC 701 (July 1999), in which the Commission denied the operator's request for relief from the final Commission decision because it had offered no reason for its failure to respond to the petition for penalty assessment or to the judge's show cause order. *Id.* at 702-03. We noted in *Cusic* that, as in the instant case, "the judge's show cause order . . . unambiguously and in plain language ordered [the operator] to 'send an Answer . . . within 30 days or show good reason for [failing] to do so.'" *Id*. at 702 n.1 (citation omitted).

Given the complete lack of any explanation as to why this instruction was entirely disregarded, I would deny the request for relief, and thus respectfully dissent.

Mary Lu Jordan, Commissioner

Distribution

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